

NOTICES OF EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may determine that adoption, amendment, or repeal of a rule is necessary for immediate preservation of the public health, safety, or welfare and the notice and public participation requirements are impracticable. Under this determination, the agency may adopt the rule as an emergency and submit it to the Attorney General for review. The Attorney General approves the rule and then files it with the Secretary of State. The rule remains in effect for 180 days. An emergency rule may be renewed for one 180-day period if the requirements of A.R.S. § 41-1026 are met. If the emergency rule is not renewed or the rule is not permanently adopted by the end of the 180-day period, the emergency rule expires and the text of the rule returns to its former language, if any.

NOTICE OF EMERGENCY RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES LABORATORIES

[R06-67]

PREAMBLE

1. Sections Affected

R9-14-403
R9-14-404
Exhibit 4
Exhibit 5
Exhibit 6
Exhibit 6A

Rulemaking Action

Amend
Amend
New Exhibit
New Exhibit
New Exhibit
New Exhibit

2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. §§ 41-1026 and 41-1713(A)(9)
Implementing statutes: A.R.S. §§ 28-1323, 28-1324, and 28-1325

3. The effective date of the rules:

February 23, 2006

The Arizona Department of Public Safety (DPS) requests an immediate effective date. The rule shall be effective immediately on filing in the Office of the Secretary of State. An immediate effective date is required to preserve the public safety. Driving Under the Influence (DUI) and Operating Under the Influence (OUI) of alcohol, with its related loss of life, serious bodily injury, and property damage, must be deterred through aggressive enforcement. Therefore, the Department of Health Services approved the RBT AZ for use in Arizona as a modern, effective breath testing device that is particularly well suited to use in boating, national parks and correction/parole environments. This initial approval would have expired September 15, 2005 but DPS filed the necessary request for continued approval via emergency rulemaking. This emergency rulemaking was approved, but will expire on February 27, 2006. DPS is actively pursuing a comprehensive alcohol rulemaking process and has filed a Notice of Rulemaking Docket Opening and a Notice of Proposed Rulemaking with the Office of the Secretary of State. This second and final emergency rulemaking for the RBT AZ continues the incorporation of the RBT AZ and related checklists into the alcohol rules, until completion of the rulemaking process. Currently, thousands of DUI/OUI alcohol tests have been performed on the RBT AZ and loss of approval would jeopardize numerous DUI/OUI convictions, leaving the Arizona Game and Fish, Bureau of Indian Affairs/Navajo Nations, Department of Corrections and the Arizona State Park Service without one of their most effective tools for DUI/OUI and alcohol enforcement. As a result, an effective date preceding February 27, 2006 is necessary.

4. Is this rulemaking a renewal of a previous emergency rulemaking?

This rulemaking is a renewal of a previous emergency rulemaking.

If yes, the Register citation to previous notices of emergency rulemaking:

Notice of Emergency Rulemaking: 11 A.A.R. 3568, September 23, 2005

5. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Robert D. Burris
Quality Manager, Scientific Analysis Bureau

Address: Arizona Department of Public Safety
Central Regional Crime Laboratory
P.O. Box 6638
Phoenix, AZ 85005-6638

Telephone: (602) 223-2733

Fax: (602) 223-2924

E-mail: RBurris@azdps.gov

Name: Todd A. Griffith
Superintendent, Scientific Analysis Bureau

Address: Arizona Department of Public Safety
Central Regional Crime Laboratory
P.O. Box 6638
Phoenix, AZ 85005-6638

Telephone: (602) 223-2494

Fax: (602) 223-2924

E-mail: TGriffith@azdps.gov

6. An explanation of the rule, including the agency's reasons for initiating the rule:

The Director of DPS was recently granted the authority pursuant to A.R.S. §§ 28-1324 and 41-1713 to adopt rules prescribing methods and procedures for the administration of breath tests to determine alcohol concentration, including the approval of quantitative breath testing devices and procedures for ensuring the accuracy of results obtained from approved breath testing devices. The purpose of the statute is to ensure the accuracy and reliability of breath testing devices and to facilitate the apprehension and prosecution of drivers who operate motor vehicles under the influence of alcohol; A.A.C. R9-14-403 and R9-14-404 implement the statute by providing devices, methods, and procedures approved by the DPS to detect the amount of alcohol in the breath of an individual. On September 15, 2003, while under the authority of the Department of Health Services (DHS), the DHS Director pursuant to A.A.C. R9-14-403(K) approved the RBT AZ as a quantitative alcohol breath testing device and approved a standard operational procedure, standard calibration check procedure, and two standard quality assurance procedures for its operation. A first emergency rulemaking for the RBT AZ approval was then granted but will expire on February 27, 2006. The purpose of this second emergency rulemaking is to allow Arizona law enforcement and prosecutorial agencies the continued use of the RBT AZ and related checklists until the proposed rulemaking process is completed. The continual use of the RBT AZ and related checklists is necessary to enforce Arizona's DUI statutes in our state parks, public lands and reservations as well as correction/probation situations requiring zero alcohol tolerance. This second and final emergency rulemaking for the RBT AZ continues the incorporation of the RBT AZ and the standard operational procedure, calibration check procedure, and standard quality assurance procedures in the existing alcohol rules, R9-14-403 and R9-14-404.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The summary of the economic, small business, and consumer impact:

The approval of this rule would not have an economic, small business, or consumer impact. However, the economic impact of not approving this emergency rule will be substantial. The RBT AZ has been utilized by law enforcement for over two years and jurisdictions that currently use the RBT AZ would bear the costs involved in purchasing new instruments, training personnel on the new instruments, and preparing the new instruments for use. Failure to approve this emergency rule will also impact the public, who will be required to subsidize costs incurred by the jurisdictions.

9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

10. Incorporations by reference and their location in the rules:

DPS is not incorporating by reference any, all, or part of any code, standard, or rule.

11. An explanation of the situation justifying the rule's making as an emergency rule:

The statewide impact of failure to grant this emergency rulemaking will significantly affect public health, safety and welfare. The statewide impact includes: (1) the inability to as effectively enforce Arizona DUI/OUI laws and deter

Notices of Emergency Rulemaking

impaired drivers; (2) placing numerous DUI/OUI cases in jeopardy; (3) leaving some Arizona law enforcement agencies with no approved alcohol breath testing device; (4) creating a several month window with reduced DUI/OUI enforcement as impacted agencies purchase new breath test instruments and hundreds of officers are retrained to operate this device; (5) numerous legal challenges regarding past and future use of the RBT AZ; and (6) false and misguided perceptions that the RBT AZ is an unreliable instrument.

The RBT AZ is the breath testing device selected by some agencies for Arizona DUI/OUI enforcement. The RBT AZ has been selected by these agencies as the best instrument to meet their specialized needs of cost-effective OUI enforcement for boating, off-road vehicles, reservation and correction/probation alcohol enforcement. Therefore, the RBT AZ was approved by the Department of Health Services. There are now more than 85 of these devices in the field throughout the state with hundreds of Arizona trained Operators and Quality Assurance Specialists. These Operators and Quality Assurance Specialists include Arizona Game and Fish, Arizona State Parks, the Navajo Nation, Arizona Department of Corrections and Probation/Parole. Thousands of DUI/OUI cases have been performed on this device. Some cases have been adjudicated and some are still pending final adjudication. The RBT AZ also offers the highly desirable mobile or point-of-contact DUI testing in which the DUI/OUI suspect can have his alcohol concentration checked immediately instead of being transported to an instrument located at a substation, which may be 30 minutes away to two hours away in rural Arizona or in boating and off-road situations.

This breath test device is significant in enforcing Arizona DUI/OUI laws and deterring impaired driving. Continuation of the use of the RBT AZ in Arizona, through this emergency rulemaking, is significant to public safety, health, and welfare and allows saved lives, lessened bodily injury, and reduced property damage from DUI/OUI drivers.

12. The date of the Attorney General’s approval of the emergency rule:

February 22, 2006

The Attorney General is requested to complete approval and file this emergency rulemaking with the Secretary of State prior to February 27, 2006.

13. The full text of the rules follows:

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES
LABORATORIES

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

Section

R9-14-403. Breath-testing and Collection Devices

R9-14-404. Testing Procedures

Exhibit 4. Standard Operational Procedure – RBT AZ – Duplicate Test

Exhibit 5. Standard Quality Assurance Procedures – RBT AZ – Standard Calibration Check Procedure

Exhibit 6. Standard Quality Assurance Procedures – RBT AZ

Exhibit 6A. Standard Quality Assurance Procedures – RBT AZ - Calibration

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

R9-14-403. Breath-testing and Collection Devices

A. No change

B. No change

C. No change

D. No change

E. No change

F. No change

G. The following quantitative breath-testing and collection devices are approved by the Director:

| Model | Manufacturer |
|--------------------------|--------------------------|
| Breathalyzer 900/900A | Smith and Wesson Co. |
| Alco-Sensor III | Intoximeters, Inc. |
| Intoxilyzer Models 4011A | CMI, Inc./Federal Signal |

Notices of Emergency Rulemaking

| | |
|--|--|
| Modified and 4011AS Modified with or without Beam Attenuator | |
| Intoxilyzer Models 4011A | CMI, Inc./Federal Signal |
| Modified and 4011AS Modified with Sample Preservation Modification with or without Beam Attenuator | |
| Intoxilyzer Model 5000 | CMI, Inc./Federal Signal |
| Intoxilyzer Model 5000 with or without Vapor Recirculation and with or without Keyboard | CMI, Inc. |
| Intoximeter Model 3000 | Intoximeters, Inc. |
| Mark IV GCI | Intoximeters, Inc. |
| GCI Field Collection Unit | Intoximeters, Inc. |
| PST-10 Silica Gel Tube (also known as SM-10 Silica Gel Tube) | Luckey Laboratories, Inc./ U.S. Alcohol Testing of America, Inc. |
| RBT IV (Alco Sensor IV with a RBT IV printer microprocessor) | Intoximeters, Inc. |
| <u>RBT AZ</u> (Alco Sensor AZ/RBT AZ) | <u>Intoximeters, Inc.</u> |
| Toxtrap Silica Gel Tube | Toxtrap, Inc./ Federal Signal |
| Intoxilyzer Model 5000EN | CMI, Inc. |
| Intoxilyzer 8000 | CMI, Inc. |

- H. No change
- I. No change
- J. No change
- K. No change

R9-14-404. Testing Procedures

- A. Law enforcement agencies or individuals acting independently of such agencies who conduct alcohol concentration determinations by means of breath-testing devices shall implement a quality assurance program conducted by a quality assurance specialist. This quality assurance program shall include:
 - 1. Criteria for ensuring the proper operation of devices by testing device controls and indicators to ensure that they are functioning as required by the Department quality assurance procedures for the devices. The procedures shall be performed and recorded within 90 days of each other following the appropriate Department quality assurance procedure set forth in Exhibits F, H, J, M, Q, Q-EN, QQ, QQ-EN, T, V, Z, 6 and 6A, 3 and 3A or as approved by the Director according to R9-14-403(K).
 - 2. Calibration checks of breath-testing devices that shall be performed and recorded according to the requirements of the appropriate Department quality assurance procedure set forth in Exhibits F, J, L, P, P-EN, PP, PP-EN, S, V, Y, 5, 2 and 2A or as approved by the Director according to R9-14-403(K).
 - 3. No change
 - 4. No change
 - 5. No change
 - 6. No change
- B. Operator permit holders shall utilize the operator procedure approved by the Department for the device being operated in performing tests and collecting samples for the determination of alcohol concentration, as contained in Exhibits E, EE, G, I, II, K, KK, N, NN, O, OO, OOO, R, RR, U, UU, W, WW, WWW, WWW-EN, X, 4, and 1 or as approved by the Director according to R9-14-403(K).
- C. No change

Notices of Emergency Rulemaking

EXHIBIT 4
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD OPERATIONAL PROCEDURE
INTOXIMETER RBT AZ

DUPLICATE TEST

AGENCY
NAME OF SUBJECT DATE
RBT AZ SERIAL NO. ALCO-SENSOR AZ SERIAL NO.
OPERATOR LOCATION OF TEST

TEST RESULTS 0. AC TIME
0. AC TIME
0. AC TIME

Immediately preceding the administration of the tests the subject underwent a 15-minute deprivation period
From to by

- () 1. Depress RBT AZ ON button.
() 2. Depress zero set button, select subject or quick test.
() 3. Follow RBT AZ and AS AZ display instructions.
() 4. Enter case # &/or DL # if required.
() 5. Device temperature registers between 10° C and 40° C.
() 6.
A. If quick test, go to step 7.
B. If subject test, repeat steps 3-6 for duplicate test.
C. If the second subject test is not within 0.020 of the first test, repeat steps 3-6.
D. If the second subject test is within 0.020 of the first test, go to step 7.
E. If the third subject test, go to step 7.
() 7. Remove test record when printout is complete.
() 8. Turn off RBT IV AZ.

Note: Duplicate tests shall be administered at intervals of not less than 5 minutes nor more than 10 minutes. Two consecutive tests shall agree within 0.020 alcohol concentration.

EXHIBIT 5

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXIMETER RBT AZ

STANDARD CALIBRATION CHECK PROCEDURE

AGENCY _____ DATE _____
RBT AZ SERIAL NO. _____ ALCO-SENSOR AZ SERIAL NO. _____
QA SPECIALIST _____ LOCATION _____
(Print Name)

- () 1. Have a standard alcohol source of known value ready.
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. _____ AC.
- () 2. Depress RBT AZ ON button. Depress Time button.
Enter PIN #. Depress zero button.
- () 3. Follow RBT AZ and AS AZ display instructions.
- () 4. Device temperature registers between 10° C and 40° C.
- () 5. When AS AZ display reads "CHEK", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- () 6. Test results 0. _____ AC.
- () 7. Remove test record when printout is complete.
- () 8. Turn off RBT AZ.

COMMENTS _____

SIGNATURE _____

EXHIBIT 6

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD QUALITY ASSURANCE PROCEDURE
INTOXIMETER RBT AZ

AGENCY _____ DATE _____
RBT AZ SERIAL NO. _____ ALCO-SENSOR AZ SERIAL NO. _____
QA SPECIALIST _____ LOCATION _____
(Print Name)

- () 1. Have a standard alcohol source of known value ready.
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. _____ AC.
- () 2. Depress RBT AZ ON button. Depress Time button.
Enter PIN #. Depress zero button.
- () 3. Follow RBT AZ and AS AZ display instructions.
- () 4. Device temperature registers between 10° C and 40° C.
- () 5. When AS AZ display reads "CHEK", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- () 6. Test results 0. _____ AC.
- () 7. Remove test record when printout is complete.
- () 8. Turn off RBT AZ.

_____ Date and time correct.
_____ Alcohol-free subject test result 0. _____ AC.
_____ Proper sample recognition system.
_____ Fuel cell response time for a standard solution.
_____ Standard value: _____ AC. Time: _____ sec.
_____ Controls, displays, and printer worked correctly during the above quality assurance procedures.

COMMENTS _____

SIGNATURE _____

EXHIBIT 6A

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD QUALITY ASSURANCE PROCEDURE
INTOXIMETER RBT AZ

CALIBRATION

AGENCY _____ DATE _____
RBT AZ SERIAL NO. _____ ALCO-SENSOR AZ SERIAL NO. _____
QA SPECIALIST _____ LOCATION _____
(Print Name)

- () 1. Have a standard alcohol source of known value ready.
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. _____ AC.
- () 2. Depress RBT AZ ON button.
- () 3. Depress Time button, enter PIN #, depress #1 button.
- () 4. Follow RBT AZ and AS AZ display instructions.
- () 5. Device temperature registers between 23° C and 27° C.
- () 6. After a blank reading of 0.000 is displayed and the standard value is displayed, depress F3.
- () 7. When AS AZ display flashes "CAL", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- () 8. Remove test record when printout is complete.
- () 9. Run a calibration check on the Standard Calibration Check Procedure. Test results: _____ AC.

COMMENTS _____

SIGNATURE _____